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Donald E. Shelton  
*Washtenaw County Circuit Court*

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# EQUALLY BAD IS NOT GOOD: ALLOWING TITLE IX “COMPLIANCE” BY THE ELIMINATION OF MEN’S COLLEGIATE SPORTS

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Honorable Donald E. Shelton\*

*Athletic participation is an important part of the educational process, instilling important lessons about discipline and teamwork. Title IX was intended to address the historic lack of opportunities for women and girls to participate in school athletics. Unfortunately, the current administrative interpretation of Title IX permits the elimination of male athletic opportunities as a means of complying with the statute’s equality standard. This result undermines the purpose of Title IX and the role of athletics in the educational process for all students.*

## INTRODUCTION

In 1972, Congress made an important decision about education by enacting Title IX of the Education Amendments of 1972.<sup>1</sup> The statute provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>2</sup> Pursuant to the statute, the U.S. Department of Education Office for Civil Rights (OCR) adopted regulations implementing Title IX in the area of school athletics.<sup>3</sup> The regulation states that

[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural

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\* Presiding Civil/Criminal Judge, Washtenaw County Circuit Court, Ann Arbor, Michigan. B.A. 1966, Western Michigan University; J.D. 1969, University of Michigan Law School.

1. 20 U.S.C. § 1681 (1994).

2. *Id.* § 1681(a).

3. Athletics Rule, 45 C.F.R. § 86.41 (2000). For an overview of the statute and regulations from the OCR perspective, see U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, EQUAL OPPORTUNITY IN INTERCOLLEGIATE ATHLETICS: REQUIREMENTS UNDER TITLE IX OF THE EDUCATIONAL AMENDMENTS OF 1972, at <http://www.ed.gov/offices/OCR/docs/interath.html> (last updated Dec. 28, 2000).

athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.<sup>4</sup>

In 1979, the OCR adopted a policy interpretation of Title IX prescribing how the statute would be applied to intercollegiate athletics.<sup>5</sup> The interpretation provides what is now known as the "three-part test":<sup>6</sup>

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>7</sup>

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4. 45 C.F.R. § 86.41 (a).

5. Title IX of the Educational Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979), *available at* <http://www.ed.gov/offices/OCR/docs/t9interp.html> (last updated Aug. 13, 1999).

6. U.S. Dep't of Educ. Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <http://www.ed.gov/offices/OCR/docs/clarific.html> (last updated Jan. 10, 2001) [hereinafter Clarification].

7. A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

The first part of this compliance test, known as the “substantial proportionality test,”<sup>8</sup> has generated a great deal of controversy and some significant legal disputes,<sup>9</sup> as colleges and universities eliminated men’s sports to comply with what has been perceived to be OCR demands.<sup>10</sup> In response, Congress held hearings in 1995 to review the status of OCR enforcement.<sup>11</sup> Schools claimed that the substantial proportionality test was in reality the only standard by which OCR judged whether their program was Title IX compliant.<sup>12</sup> As the President of Brown University stated to Congress in 1995, “Proportionality: [c]ontrary to OCR, is not just one of three tests. It is the paramount test.”<sup>13</sup>

Though Congress took no action as a result of the hearing, in January 1996, the OCR Assistant Secretary issued a *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*.<sup>14</sup> The clarification stated that

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.<sup>15</sup>

The Secretary’s clarification went on to provide what has turned out to be perhaps the most controversial interpretation of the statute:

OCR also received comments that indicate that there is still confusion about the elimination and capping of men’s teams in the context of Title IX compliance. The rules here are

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8. Clarification, *supra* note 6.

9. See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

10. *Hearing on Title IX of the Education Amendments of 1972 Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 9–11 (1995) [hereinafter *Title IX Hearing*] (statement of Hon. J. Dennis Hastert, Representative, Illinois).

11. *Id.* at 1 (statement of Representative McKeon, Chairman, House Subcomm. on Postsecondary Educ., Training and Life-Long Learning).

12. *Id.* at 78–79 (statement of Vartan Gregorian, President, Brown Univ.).

13. *Id.* at 79.

14. Clarification, *supra* note 6.

15. *Id.*

straightforward. *An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.*<sup>16</sup>

This Article argues that the OCR substantial proportionality test ignores athletics educational purpose and has reduced participation opportunities for both male and female student-athletes. Part I summarizes the social and legal context that has shaped the controversy surrounding the OCR test. Part II examines the purpose underlying Title IX and concludes that the statute articulates a national policy that recognizes the importance of school athletics and seeks to provide more athletic opportunities for females. Part II also argues that Congress never intended Title IX compliance to reduce the number of male athletic opportunities. Part III examines and rejects the argument that economic necessity justifies the elimination of male athletic opportunities in favor of female athletic opportunities. The Article concludes with a regulatory reform recommendation.

## I. THE CONTROVERSY

Colleges and universities have taken advantage of the Secretary's now overt invitation to eliminate male athletic opportunities as a means of achieving Title IX compliance. To be sure, female athletic participation rates have increased dramatically and steadily over the last ten years,<sup>17</sup> whereas male participation rates declined or stayed roughly the same.<sup>18</sup> At the same time, men's athletic teams in the so-called nonrevenue or Olympic sports were eliminated at an alarming rate.<sup>19</sup> A General Accounting Office (GAO) study of intercollegiate athletic participation rates, as well as National Collegiate Athletic Association (NCAA) participation studies, show that male participation rates have declined rapidly,

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16. *Id.* (emphasis added).

17. Nat'l Collegiate Athletic Ass'n, *NCAA Championship Sports Participation Overall 1982-99*, [http://www.ncaa.org/participation\\_rates/1982-99\\_overall.html](http://www.ncaa.org/participation_rates/1982-99_overall.html) (last updated June 7, 2000) (on file with the *University of Michigan Journal of Law Reform*). For an analysis of the NCAA data, see University of Iowa Gender Equity in Sports Project, *NCAA Changes in Participation, Squad Sizes, & Teams*, <http://bailiwick.lib.uiowa.edu> (last updated Oct. 16, 2000) (on file with the *University of Michigan Journal of Law Reform*).

18. Nat'l Collegiate Athletic Ass'n, *NCAA Participation At-A-Glance 1983-1998*, [http://www.ncaa.org/participation\\_rates/1983-98\\_at\\_a\\_glance.html](http://www.ncaa.org/participation_rates/1983-98_at_a_glance.html) (last updated June 7, 2000) (on file with the *University of Michigan Journal of Law Reform*).

19. Two hundred fifty-five colleges have dropped wrestling since Title IX was adopted in 1972. *Devastating Facts!*, AMATEUR WRESTLING NEWS, Oct. 30, 1995, at 22.

especially in certain sports.<sup>20</sup> Participation in men's gymnastics declined by 56% and men's wrestling declined by 33%.<sup>21</sup> While men's soccer declined 11%, women's soccer increased 154%.<sup>22</sup> The most recent reports indicate that colleges and schools are continuing to drop sports like men's gymnastics and wrestling.<sup>23</sup>

This trend has prompted a debate that has polarized interested parties. On the one hand, groups opposed to cutting men's sports claim that the proportionality standard ignores what they say is a "lower female interest level" in sports.<sup>24</sup> Opponents cry "quota" to politically inflame the rhetoric.<sup>25</sup> On the other hand, the OCR and Title IX supporters argue that achieving proportionality through the elimination of male sports is consistent with the statutory equality requirement.<sup>26</sup> Supporters fear that any attempted revision of the law might open it up to wholesale reversals of gains in female sports.<sup>27</sup>

Court decisions upholding the right of schools to achieve compliance through the Secretary's proportionality loophole<sup>28</sup>

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20. GAO Study Shows Drop in Men's Participation, But Reason Is Unclear, THE NCAA NEWS, July 5, 1999 [hereinafter GAO Study], <http://www.ncaa.org/news/19990705/active/3614n02.html>. See generally U.S. GENERAL ACCOUNTING OFFICE, REPORT TO DENNIS HASTERT, H. OF REP., INTERCOLLEGIATE ATHLETICS: COMPARISON OF SELECTED CHARACTERISTICS FOR MEN'S AND WOMEN'S PROGRAMS, GAO/HEHS 99-3R (June 18, 1999), available at <http://www.gao.gov>.

21. GAO Study, *supra* note 20.

22. *Id.*

23. See, e.g., Nat'l Collegiate Athletic Ass'n, 1997-1998 Yearly Participation Rates—Men, [http://www.ncaa.org/participation\\_rates/1997-98\\_m\\_participation.html](http://www.ncaa.org/participation_rates/1997-98_m_participation.html) (last updated June 7, 2000) (on file with the *University of Michigan Journal of Law Reform*).

24. Curt Levey, *Title IX's Dark Side: Sports Gender Quotas*, USA TODAY, July 12, 1999, at A17, available at <http://www.cir-usa.org/calusa71299.html>. However, as University of Iowa Women's Athletic Director Christine Grant commented, "Many both in and outside of sport, confuse lower participation numbers in girls' and women's sport with a lack of interest. The lack of interest is not the problem; the lack of opportunity is." *Intercollegiate Sports (Part 2) Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 102d Cong. 100 (1992) [hereinafter *Intercollegiate Hearing*] (testimony of Christine H.B. Grant, Women's Athletic Director, Univ. of Iowa).

25. See, e.g., Levey, *supra* note 24, at A17; see also *Americans Against Quotas: Providing Athletic Opportunities for All American Youth*, <http://www.aaq2000.org>. (last visited Jan. 26, 2001) (on file with the *University of Michigan Journal of Law Reform*); *Iowans Against Quotas*, <http://www.iaq2000.org> (last visited Jan. 26, 2001) (on file with the *University of Michigan Journal of Law Reform*).

26. See Andrew Bottesman, *Gender Equity Hit by Backlash*, CHI. TRIB., May 7, 1995, § 3, at 5 (stating that proponents of Title IX believe that "schools should solicit new revenues or use partial cuts in men's sports").

27. E.g., *Title IX Hearing*, *supra* note 10, at 197 (statement of Wendy Hilliard, President, Women's Sports Found.).

28. E.g., *Kelley v. Board of Trustees*, 35 F.3d 265, 269-70 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 899 (1st Cir. 1993).

have fueled the debate.<sup>29</sup> Most recently, in *Boulahanis v. Board of Regents*,<sup>30</sup> the Seventh Circuit upheld Illinois State University's decision to eliminate its men's wrestling and soccer programs as compliant with Title IX.<sup>31</sup> The court rejected claims that eliminating male sports to make participation levels more proportional to female sports was itself a violation of Title IX,<sup>32</sup> a denial of equal protection,<sup>33</sup> or unlawful sex discrimination under 42 U.S.C. § 1983.<sup>34</sup>

I suggest that both extremes in this controversy are wrong and will impede Title IX's underlying national policy purposes in the long run.

## II. UNDERMINING THE PURPOSE OF TITLE IX

Title IX is a provision of our *education* law. It expresses a national policy supporting athletics in schools and suggests that athletics are an important part of the educational process.

Athletics are obviously not vocational training; the number of professional athletes and coaches is miniscule in comparison to the number of athletic participants. Rather, we regard participation in athletics as an important part of the education of our children. Athletic participation can teach important lessons about discipline, teamwork, preparation, integrity, and many other life values. Consistent with this belief, the United States has a history of organized athletic competition in public and private schools at almost every level. We do not provide athletic opportunities in school to train our children to be professional athletes or coaches.

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29. Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DET. C.L. REV. 953, 954-55.

30. 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000).

31. *Id.* at 639.

32. The court stated:

As we noted in *Kelley [v. Board of Trustees]*, 35 F.3d 265, 270 (7th Cir. 1994)], the elimination of men's athletic programs is not a violation of Title IX as long as men's participation in athletics continues to be "substantially proportionate" to their enrollment. . . . Because the University has achieved substantial proportionality between men's enrollment and men's participation in athletics, it is presumed to have accommodated the athletic interests of that sex.

*Id.* at 638-39.

33. *Id.* at 639.

34. *Id.* at 640 (dismissing the § 1983 claim where remedies would be unavailable even if a violation were found).

We provide these opportunities because we believe athletic participation creates better citizens and better people.

In 1972, we recognized as a nation that we were not adequately providing the same athletic opportunities to girls and women.<sup>35</sup> Title IX's purpose was clearly to increase the educational opportunities available to girls and women through school athletic programs.

Both sides of the ongoing controversy over the OCR substantial proportionality test have lost sight of Title IX's goal of increasing the participation opportunities for female student-athletes. On the one hand, claims that women have little or no interest in sports are simply not true, as the recent increases in female participation levels demonstrate.<sup>36</sup> These claims also ignore the significant social and historical reasons why women have not had more athletic opportunities in the past. Inflammatory "quota"<sup>37</sup> rhetoric blatantly attempts to politicize the issue by pitting men against women and even whites against blacks.<sup>38</sup>

On the other hand, the OCR Secretary's literal interpretation of Title IX through its substantial proportionality test created a loophole that allows schools to achieve Title IX compliance by eliminating athletic educational opportunities<sup>39</sup> and ignores the educational purposes of the 1972 law.<sup>40</sup> The OCR focuses on a concept of equality not supported by the language or the intent of the statute. The law was written in the context where schools were providing a multitude of educational athletic opportunities for

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35. As Congresswoman Patsy Mink said, "When Congress passed Title IX in 1972, women represented a mere 2% of the nation's college varsity athletes and received only 1/2 of one percent of schools' athletic budgets." *Title IX Hearing, supra* note 10, at 4 (statement of Hon. Patsy Mink, Representative, Hawaii).

36. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CARLIS COLLINS, H. OF REP., INTERCOLLEGIATE ATHLETICS: STATUS OF EFFORTS TO PROMOTE GENDER EQUITY, GAO/HEHS 97-10, at 1 (Oct. 25, 1996), available at <http://www.gao.gov>; see also sources cited *supra* notes 17, 18, 20.

37. The representative of a national coaches association stated, "Gender equity, however, should not be synonymous with gender quotas. The OCR's gender quota, which masquerades as the proportionality rule, is now an anachronism which should be abolished." *Title IX Hearing, supra* note 10, at 154 (statement of T.J. Kerr, Nat'l Wrestling Coaches Ass'n).

38. For example, Walter B. Connolly, an attorney who represented several universities in Title IX litigation, asserts that the law itself is racially discriminatory: "True beneficiaries [of Title IX] are middle-class white women from suburban high schools. . . . African American males are directly hurt in disproportionate numbers by elimination of scholarships in football and basketball." Wade Lambert, *Title IX Costs Black Men, Lawyer Says*, WALL ST. J., June 24, 1994, at B7.

39. See sources cited *supra* notes 28–29.

40. See discussion *infra* Part II.



males but very few for females.<sup>41</sup> Consequently, Title IX requires that females not "be excluded from participation in" those activities and opportunities.<sup>42</sup> Congress never contemplated that schools would be allowed, much less encouraged, to eliminate male athletic opportunities as a means of achieving the statute's purpose of providing more female athletic opportunities. As Congressman Dennis Hastert confirmed, "Title IX was supposed to be a statute to increase opportunities. . . . It does not help create opportunities for women when a school simply cuts a sport such as soccer, swimming, wrestling, or baseball to comply."<sup>43</sup> The goal is not equal opportunities for women. The goal is more opportunities for women. Therefore, the law's intent is satisfied when opportunities are equally good, not equally bad.

### III. THE ECONOMIC NECESSITY DEFENSE

Some schools justify the elimination of men's sports to achieve Title IX compliance on the basis of economic necessity.<sup>44</sup> These schools argue that eliminating nonrevenue men's sports is required if they are to add women's sports.<sup>45</sup> The court in *Boulahanis v. Board of Regents*<sup>46</sup> accepted this argument wholeheartedly:

[A] holding that universities cannot achieve substantial proportionality by cutting men's programs is tantamount to a

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41. The University of Iowa Women's Athletic Director testified, "After Title IX was passed in 1972 and educational institutions were forced to offer sport opportunities for girls, the number of girls participating in sport at public schools exploded from 7 percent in 1971 to 35 percent in 1981." *Intercollegiate Hearing*, *supra* note 24, at 98 (testimony of Christine H.B. Grant, Women's Athletic Director, Univ. of Iowa); *see also supra* note 35.

42. 20 U.S.C. § 1681(a) (1994).

43. *Title IX Hearing*, *supra* note 10, at 10, 12 (statement of Hon. J. Dennis Hastert, Representative, Illinois).

44. *Title IX Hearing*, *supra* note 10, at 101-02 (statement of David. L. Jorns, President, E. Ill. Univ.).

45. Reacting to *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), the President of Brown University threatened:

We believe that such decisions, if left standing, will establish an arbitrary numerical reference system that will force universities, pressed by constrained budgets, to eliminate men's sports in order to meet court-imposed quotas, rather than offer an athletic program that meets the respective levels of interest and abilities of both men and women to play varsity sports.

*Title IX Hearing*, *supra* note 10, at 83 (statement of Vartan Gregorian, President, Brown Univ.).

46. 198 F.3d 633, 638 (7th Cir. 1999).

requirement that universities achieve substantial proportionality through additional spending to add women's programs. This result would ignore the financial and budgetary constraints that universities face. . . . Unless we are willing to mandate such spending, the agency's substantial proportionality rule must be read to allow the elimination of men's athletic programs to achieve compliance with Title IX.<sup>47</sup>

This argument has significant flaws. First, economics has not been the basis upon which schools have determined which athletic opportunities to offer. On average, collegiate athletic programs lose money.<sup>48</sup> Even at the Division I-A level, when general fund support is taken out of the picture, athletic departments show substantial deficits.<sup>49</sup> If cost or revenue were the determining factors, football would have disappeared from most collegiate athletic programs years ago, even without Title IX. Except for the top forty to fifty Division I schools, colleges and universities lose large sums of money on massive football programs every year.<sup>50</sup> If, in the face of Title IX, schools were truly making economic decisions, they would drop the most expensive sports. Rather, the schools are eliminating some of the least expensive men's sports.

The reality is that athletic departments are costs that colleges and universities bear for the same reason that they bear the costs of chemistry departments: to provide a good education. Historically, most schools have not made decisions about athletics, or any other educational program, based primarily on cost. The issue for every program is whether the activity furthers the institution's educational goals. As the NCAA Director put it

The cost of intercollegiate athletics is rising but it is also a sound investment. Intercollegiate athletics offer interested and able students opportunities to pursue excellence in a chosen endeavor, develop self-esteem, experience the lessons

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47. *Id.* at 638. The court also relied upon the ruling in *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993), which referred to the inability of schools to expand women's athletic programs "in times of economic hardship." *Id.* at 638. Illinois State did not claim economic hardship in *Boulahanis* and it is difficult to imagine that the court was referring to the current situation as one of economic hard times.

48. See generally DANIEL L. FULKS, NAT'L COLLEGIATE ATHLETIC ASS'N, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS—1993 (1994).

49. *Title IX Hearing*, *supra* note 10, at 280 (statement of Cedric W. Dempsey, Executive Director, Nat'l Collegiate Athletic Ass'n).

50. *Id.*

of competition, develop physical and leadership skills, and be part of a team. The benefits to be derived from participating in sports are as valuable to our daughters as they are to our sons.<sup>51</sup>

Football is kept in spite of its huge cost because of the program's value to the participants, as well as the visibility that it brings to the institution.<sup>52</sup> For each men's sport that is already offered at a school, the school has determined that the sport furthers its educational goals. Nothing about Title IX should change that determination. The law simply says that schools also have to provide that educational opportunity to women.

More importantly, Title IX was designed to do exactly what the *Boulahanis* court feared. National policy requires schools to increase opportunities for women in athletics as a condition to receiving federal funds. Thus, Title IX is "tantamount to a requirement that universities achieve substantial proportionality through additional spending to add women's programs."<sup>53</sup> The courts, however, do not have to be "willing to mandate such spending."<sup>54</sup> Rather, the federal government, which provides the aid that schools seek to retain by compliance, has statutorily required such additional spending.

This is not an unusual situation. The federal government requires recipient institutions to comply with additional spending requirements in a multitude of federal programs, especially when those requirements are designed to alleviate prior deprivations.<sup>55</sup> The additional spending requirement is only imposed on institutions that wish to continue to receive taxpayer funds to support all of their educational programs, including athletics. Title IX is voluntary in the sense that schools can refuse to provide any women's sports opportunities they want provided they are willing to forego federal funding. Several institutions have done just that.<sup>56</sup>

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51. *Id.* at 281.

52. As the former NCAA Executive Director Richard Schultz once told a gathering of collegiate governing board members where I was present, "Look at the newspaper Sunday morning—how did your chemistry department do Saturday?"

53. *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 638 (7th Cir. 1999).

54. *Id.*

55. *Cf. Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 598–99 (1983) (noting that Title VI of the Civil Rights Act of 1964, is "an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed'").

56. Hillsdale College in Michigan, along with several other schools, began refusing to accept federal funding in the 1970s. *About Hillsdale College*, at <http://www.hillsdale.edu/about> (last visited Jan. 27, 2000) (on file with the *University of Michigan Journal of Law Reform*). Grove City College in California decided not to accept any

For the majority of schools that continue to request and to spend federal funds, however, providing *more* athletic opportunities for women is mandatory. Title IX was designed to eliminate sex discrimination without regard to cost. As Ellen J. Vargyas of the National Women's Law Center put it, "[T]he questions here are ultimately not about money. It is simply not tenable for our higher education institutions to perpetuate a system characterized by pervasive sex discrimination. The challenge is clear. The question is whether our colleges and universities are up to the task."<sup>57</sup> The concern about the cost of providing more women's sports opportunities was forcefully put in perspective by a college athletic director at the same congressional hearing:

Inevitably, when Title IX is discussed, we hear concerns raised about the cost of complying. It is time for institutions to stop making excuses about the cost of providing opportunities for women student-athletes and to focus on how to fund intercollegiate athletic programs. If additional funding beyond the existing intercollegiate athletics budget is not available through generated revenue or special multipurpose discretionary funds, then the emphasis must be on increased fundraising. Again, it is a question of commitment. If institutions place compliance with Title IX high on their list of priorities, then the question of funding becomes one of "how will we do it?", not "it's not possible."<sup>58</sup>

## CONCLUSION

What ought to be done to ensure that Title IX is fairly implemented? Since 1972, our national policy has been that schools receiving federal funds must increase female educational opportunities in athletics. While we are inching forward in that process, progress is being delayed and ultimately may be stopped by a baseless regulatory interpretation that allows schools to drop men's sports rather than add women's sports. Under that interpretation,

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federal funds in direct response to a Title IX enforcement action. *Grove City Coll. v. Bell*, 465 U.S. 555, 559 (1984); John H. Moore, *No Strings Attached*, POL'Y REV., May-June 1998, at 40, available at <http://www.policyreview.com/may98/nostrings.html>.

57. *Intercollegiate Hearing*, *supra* note 24, at 96 (testimony of Ellen J. Vargyas, Senior Counsel for Education and Employment, Nat'l Women's Law Ctr.).

58. *Id.* at 107 (testimony of Vivian L. Fuller, Associate Director, Intercollegiate Athletics, Ind. Univ. of Pa.).

for every male athletic participant that is eliminated, the school can provide one *less* opportunity for a female participant.

The problem is simple. The OCR Title IX interpretation does not fairly implement the statute because it allows colleges and universities to evade the statute. The fix is equally simple. The OCR Assistant Secretary should amend its Clarification to provide that an institution cannot eliminate teams as a way of complying with part one of the three-part test.

Title IX should be interpreted to require schools that receive federal funds to provide more opportunities to women in athletics. Conversely, it should not be interpreted to allow schools to evade that responsibility by eliminating opportunities for men in athletics. To be sure, institutional screams will be heard about cost, but perhaps the best response was stated by the court in *Cook v. Colgate University*:

Equal athletic treatment is not a luxury. It is not a luxury to grant equivalent benefits and opportunities to women. It is not a luxury to comply with the law. Equality and justice are not luxuries. They are essential elements which are woven into the very fiber of this country. They are essential elements now codified under Title IX.<sup>59</sup>

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59. 802 F. Supp. 737, 750 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).